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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 593

KOEHRING COMPANY,
Petitioner,

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent,

AND

KOEHRING COMPANY,
Petitioner,

vs.

VARDAMAN S. DUNN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION

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I.

No Special or Important Reason Exists for Granting Certiorari

The instant case, we submit, meets none of the traditional tests which have prompted the issuance of the Writ of Certiorari.

In *Layne & Bowler Corporation* v. *Western Well Works*, 261 U.S. 422, 43 S.Ct. 422, 66 L.Ed 792, a Writ of Certiorari was dismissed as having been improvidently granted. Mr Chief Justice Taft, speaking for a unanimous Court, said:

> ". . . If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Court of Appeals. The present case certainly comes under neither head."

The above announcement was quoted with approval by the Court in *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897, and in this latter case the Court also observed that:

> ". . . A federal question raised by a petition may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 532, 67 L.Ed. 922; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup.Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc.Am.Law Inst. 313. 'Special and important reasons imply a reach to a problem beyond the academic or the episodic. . . .'"

As pointed out by Mr. Chief Justice Vinson:

"What the Court is interested in is the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations."[1]

We gather from the cited authorities and this Court's rules[2] that (1) the question to be answered must be both special and important and this importance must be to the public and not merely to the litigants in the particular case; and (2) it is not every apparent conflict that is to be resolved. It must be a conflict which is *real* and *embarrassing* and one which is of a potentially recurring nature.

II.

There Is No Conflict Between the Two Circuits

The unreported order of the Fifth Circuit simply recited that, pending order of the District Court in Mississippi, "this order shall constitute a transfer to enable the parties to present the matter to the District Court of Oklahoma."

There was no opinion rendered by the Fifth Circuit and no effort was made to rationalize the order in terms of reason or precedent. That which was rendered was purely a procedural direction whereby that Court acted to divest itself of further control over the case. Having thus acted, it then devolved upon the transferee Court to resolve the timing of commencing its own exercise of jurisdiction in relation to any relief requested by the litigants. This the Tenth Circuit did by the decision that its jurisdiction attached when, but not until, the Court papers were transmitted and filed with the Clerk of the District Court in Oklahoma

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1. Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 S.Ct. vi, cited with approval by the Court in *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897.

2. Rule 19, Revised Rules of the Supreme Court of the United States.

A conflict could have arisen between the two circuits only if one had ordered the case transferred and the other had refused to accept the case for ultimate disposition, thus casting the litigants adrift without benefit of forum. This did not occur. The case was transferred and was received and is still pending in Oklahoma. The only question remaining was limited to the timing of the receipt of the case as between the date of the Fifth Circuit's order of March 10, 1964 and the transmission and filing of the Court file on March 16, 1964. And since the Fifth Circuit had rejected any further control over the case by its decision to transfer, the timing of receipt question was one for the transferee Court to determine for itself. One Court fixed the date of departure and the other fixed the date of arrival. Each Court acted within its own jurisdiction without interference and certainly without any "embarrassing" conflict and without any conflict on matters of substance.

Indeed, in making the decision as to the time of vesting of jurisdiction in the Northern District of Oklahoma the Tenth Circuit could hardly have reached any other conclusion. In addressing itself to the question of *when* jurisdiction vested in a transferee court, the Tenth Circuit noted the following authorities holding that the transfer of the Court papers to the transferee Court is considered essential to that Court's acquisition of jurisdiction: *Drabik* v. *Murphy,* (CA 2d) 246 F.2d 408; and *Wright on Federal Courts,* p. 143.[3]

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3. To the same effect, see: *Littman* v. *Bache & Co.,* (CA 2d) 246 F.2d 490; *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.,* (CA 2d) 178 F.2d 866; *Fisher* v. *United Airlines, Inc.,* (S.D., N.Y., 1963) 218 F.Supp. 223; and *Tele-Views News Co., Inc.* v. *S.R.B. TV Publishing Co., Inc.,* (E.D., Pa., 1961) 28 F.R.D. 303 (modified on re-argument on other grounds).

III.

If There Be Conflict, Such Is Not of a Recurring Nature, Nor Is It Real, in the Important Sense, or Embarrassing, and the Question Is Not of Public Importance

The matter presented is not likely to be a recurring problem.

The action of the Fifth Circuit is without precedent. It finds no counterpart in past judicial history. The situation from which it emerged is quite unique and is not apt to again occur.

The matter is not of importance to the public; its importance is limited to the litigants in this particular case. A timing difference of a few hours or days in the procedural aspects of transfer from one district to another is not likely to be of any real importance to future litigants and most certainly not to the public at large. If the transferor Court desires to maintain some status quo, it can always introduce an injunction as a traveling companion to accompany the case to its intended destination, and if an interested litigant wants more immediate action than a routine transfer furnishes, he can personally see to the physical transfer of the file.

If there be any conflict between the Fifth and Tenth Circuits, it is one largely of a procedural feature in the handling of this one isolated case and is neither real (in the important sense) nor embarrassing, because each Court has fully constrained itself to action within its own sphere and competence and all issues of substance have been finally and unquestionably resolved and set at rest.

CONCLUSION

We submit that the present case does not rise above the commonplace controversy between private litigants and the issue argued by petitioner involves no principles the re-settlement of which is of sufficient important to merit review by this Court.

For the stated reasons, we submit that the Writ of Certiorari should be denied.

Respectfully submitted,

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